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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

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JAMES H. MCKENNEY,

No. 244.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

v.

CHARLES E. SEVERE, BY WILLIAM B. SEVERE, HIS NEXT FRIEND, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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Supplemental Brief on Behalf of Defendant in Error.

As to instructing the jury that the verdict could not exceed the amount claimed in the declaration.

There have been intimations in Texas that such an instruction as this is error. See Willis & Bro. *v.* McNeil, 57 Texas, 465, and in Lee *v.* Yandell, 69 Texas, 37. But in the later cases of Railway Company *v.* Burnett, 80 Texas 536, and Railway Company *v.* Stuart, 1 Tex. Civ. App. 645, a contrary conclusion was reached.

In Railway Company *v.* O'Hara, 150 Ill., 577, in which case an instruction of this kind complained of here was given the supreme court of Illinois said:

"That the amount of the *ad damnum* was the maximum beyond which the jury could not go is unquestionably a cor-

rect legal proposition, and we cannot suppose that any jury of ordinary intelligence would regard such reference alone as any intimation by the court that the damage to be assessed should reach or approximate that sum."

Additional Points and Authorities as to Negligent Construction.

1. In the plaintiff's evidence in this case nothing appeared as to the usual mode of constructing such crossings. There was at that stage of the trial a *prima facie* case of negligence. Even, therefore, if the rule as to the usual construction contended for by appellant's counsel were the law, the trial court was required to leave the whole case to the jury as to this question as well as others. This has been recently decided in Kohner *v.* Capital Traction Company, 22 App. D. C., 181.

2. This case cannot be viewed merely as if the alleged negligence in construction and the alleged negligence in operating the car were to be considered separate and distinct from each other. As the motorman must be presumed from having run his car over this crossing so often to know that the "trap" existed, it was his duty to take notice that the boy was standing with his foot in or near it and to be on his guard accordingly. For this reason alone it was negligence in him not to get his car under control.

3. The use of this word "trap" is criticised by appellant's counsel. But in referring to the avoidance of danger in just such a construction by beveling the edge of the plank, the court of appeals of New York in Spooner *v.* Railway Co., 115 N. Y., 22, said:

"It prevents any such possible *trap* for a child's or a woman's foot as is created by the straight edge."

Further, as to the conduct of the motorman in not getting his car under control in time when he saw a little child (or, according to his own statement, several little children) on the track.

In addition to the authorities cited in our principal brief on this subject, we call attention to the recently decided case of Camden Railway *v.* Broom, 139 Fed. Rep., 595. That case was decided by the circuit court of appeals for the sixth circuit, Judge Richards delivering the opinion of the court. It is on all fours with the case at bar, except that in that case the child injured was near the track, instead of on it, until the moment of the accident.

Another very similar case is White *v.* Worcester, etc., Railway, 167 Mass., 143. The child injured in that case was six years old and was in charge of another nine years old, and had its feet caught in a hole in the track.

We have seen that in this case the car traveled considerably over a hundred feet after the motorman saw the boy's foot was caught and put on the brakes.

He testified that he had seen the children when they were several hundred feet away and that he began ringing his gong when he was 150 feet from them. He is presumed to have known in what space he could stop his car, going at full speed. If he waited till he could not stop in time, whatever happened, then the effect would be just the same as though he should not stop at all. Yet the court is asked to hold not only that such conduct would not be negligence, but that reasonable men could not conclude that it was negligence.

Rescuers Not Trespassers.

Besides the case in 88 Md., 482-496, and the authorities there cited, which are given in our principal brief, we refer the court on this subject to 7th Am. & Eng. Ency., 394;

Beach on Contributory Negligence, 2d ed., 58; Linneham *v.* Sampson, 126 Mass., 506; Condiff *v.* Ry. Co., 45 Kan., 256; Ry. Co. *v.* Langendorf, 48 Ohio St., 316; Eckert *v.* Long Island R. Co., 57 Barb., 555; Gibney *v.* State, 137 N. Y., 1; Donahoé *v.* Ry. Co., 83 Mo., 560; Ry. Co. *v.* Lynch, 69 Ohio St., 123; Spooner *v.* R. Co., 115 N. Y., 33. (Counsel here say the court in this last case gave the same instruction which they asked in this case as to the duty of the motorman. We do not agree with them as to this, but in that case the injured child was fourteen years old, so that the case has no application on this point.)

Mental Suffering.

We earnestly insist that on this record the appellant cannot raise the question whether the plaintiff was entitled to recover damages for mental suffering, past and future, arising from the consciousness that he was crippled for life. We contend that the appellant is not in a condition to make this claim for two reasons: (1) Because he did not except specifically to that part of the instruction as to damages which refers to mental suffering, past and future; and (2) because the instruction confines the mental suffering which he may be compensated for to suffering which is "the natural and necessary consequence of the loss of his leg," and if the appellant's counsel conceived that the jury might have understood this instruction to refer to humiliation or mortification, they should have asked the court for a specific instruction in that regard.

In Langan *v.* Weltmer, 64 L. R. A., 969—a case decided by the supreme court of Missouri in March, 1904—plaintiff sued for injuries resulting from the negligent treatment of her case by a magnetic healer. On the measure of damages the court instructed the jury in general terms to take into consideration the plaintiff's physical injury and her bodily pain and mental anguish. This instruction was criticized by the defendant's counsel in the

supreme court of Missouri as being "so general and indefinite as to leave the jury a roving commission to do absolutely as they pleased in reference to the damages." But the court held, citing many cases, that the instruction was good as far as it went, and that if defendant desired to restrict plaintiff's right to recover to more limited bounds, they should have asked for an instruction to that effect.

If *such* mental suffering *is* the natural and necessary result of such an injury, it is the proper subject of compensation; if it is not, then the instruction did not include it. The defendant could not keep quiet, hoping the jury would not include this element of mental suffering intending all the time to insist to the court that they must have included it.

But if the question is properly raised on this record, we confidently maintain that the true rule of law is that in such a case as this the plaintiff is entitled to compensation for the mental suffering growing out of the reflection that he is a cripple, and will always be a cripple.

In the oral argument, counsel for the appellant on this subject referred to Ry. Co. *v.* Dashiell, 7 App. Cas. D. C., 509. In that case the trial court instructed the jury to allow damages for the plaintiff's physical pain and mental suffering, and then instructed them that *in addition* they should allow damages for any impairment of the plaintiff's nervous system from "nervous shock." All that was decided in that case that bears on this case was that mental pain and suffering attendant upon and the natural incident of bodily injury may be taken into consideration in estimating the damages—citing Wood's Mayne on Damages, chap. 73, sec. 64, and note of American editor.

Humiliation on account of a deformity or disfigurement is attendant upon and may be the natural incident of grievous and permanent bodily injury; so far as the case of Dashiell is pertinent here, it is in our favor.

In the oral argument it was said that while injury to the feelings is a proper subject of compensation in actions of

libel, in those cases the element of malice is taken into account, and damages are of a punitive character. Nothing, however, is better settled than that even in an action of libel exemplary damages cannot ordinarily be recovered. Frequently in libel suits, where the plaintiff has been held entitled to recover substantial damages, the defendant has exhibited no actual malice. The law implies malice, which is a way the law has of saying that the plaintiff shall be entitled to recover whether malice in fact existed or not. The application of this principle to the present case was considered in the case of Gas-Light Co. *v.* Lansden, 9 App. Cas. D. C., 508-520-526-537. It was there held that the jury was properly instructed to include damages for the plaintiff's "mental suffering," and that it was especially proper because the court had directed the jury that it was *not* a case in which punitive damages could be allowed. This case was reversed by this court (172 U. S., 534), but this point was not ruled on.

We proceed now to a consideration of the cases bearing directly upon the question of an allowance of damages for mental suffering dissociated from physical pain, but growing out of serious and permanent bodily injury.

The law on this subject is thus laid down in 1st Sedg. on Damages, 8th ed., *sec.*, 47:

"So, where a plaintiff suffers bodily mutilation through the defendant's tort, he may recover compensation for mortification which he has suffered and will suffer by reason of the mutilation and of the fact that he may become an object of curiosity and ridicule among his fellows."

In Heddles *v.* Chicago and N. W. Ry. Co., 77 Wis., 230–the plaintiff's arm was badly injured, it was held proper to instruct the jury to take into consideration in allowing for pain and mental anxiety *the impaired usefulness of the limbs, both past and in the future.*

The italicized words were objected to, but it was held that they were proper because the mental anxiety must have

meant mental suffering, resulting from the consciousness that the plaintiff's arm was disabled for life.

In Heddles *v.* Chicago and N. W. Ry. Co., 77 Wis., 230-231, the court say:

"The first error assigned is the instructions of the court to the jury on the question of damages. The instruction objected to reads as follows: 'The amount of the damages which you will assess is left to your judgment and discretion, considering the proper elements of damages, which are as follows: Adequate compensation for all of the physical and mental pain and suffering which the plaintiff suffered at the time of the accident, which he has suffered since that time, and which he is reasonably certain to suffer in the future, by reason of his injuries; also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body and the fact that he may become an object of curiosity or ridicule among his fellows.' The learned counsel for the appellant take exceptions to the use of the words, 'for the mortification and anguish of mind which he has suffered, and will suffer in the future, by reason of the mutilation of his body and the fact that he may become an object of curiosity and ridicule among his fellows.'

"It is urged that these words convey to the jury an idea different from that conveyed by the words 'mental pain and suffering' which resulted from the injury. We think the learned judge only used the expressions excepted to as indicative of the causes from which the mental pain and suffering would be likely to arise from the injury received. There can be no doubt that the loss of the plaintiff's limbs would naturally cause mortification and anguish on the part of the plaintiff, and it is also quite certain that he would be to a considerable extent an object of curiosity and to the thoughtless and unfeeling an object of ridicule. We think there was no error in the instructions excepted to. For authorities sustaining the instructions, see the following cases cited by the counsel for the respondent: Wilson *v.* Young, 31 Wis., 574; Craker *v.* C. and N. W. R. Co., 36 Wis., 657, 677; Power *v.* Harlow, 57 Mich., 107; The Oriflamme, 3 Sway., 397; Atlanta and R. A. L. R. Co. *v.* Wood, 48 Ga., 565; Toledo, W. & W. R. Co. *v.* Baddeley, 54 Ill., 19; Ballou *v.* Farnum, 11 Allen, 73; Western and A. R. R. Co. *v.* Young, 81 Ga., 397; McMahon *v.* N. C. R. Co., 39 Md., 438."

In Power *v.* Harlow, 57 Mich., 119, the trial court instructed the jury as follows:

"You have a right also to take into account the deformity occasioned by the wound and the humiliation that would naturally follow by reason of such injury."

Discussing the correctness of this charge, Cooley, C. J., speaking for the entire court, said:

"Though the word 'humiliation' was not a fortunate one to make use of, there can be no supposition that its use was misleading. There must be more or less of permanent annoyance for the mutilation of a limb, irrespective of the diminished usefulness, and the jury had a right to take this into account. This was all the judge meant."

Mental suffering on account of disfigurement of the person or impairment of the use and symmetry of the limbs have often been held to be elements proper to be considered in assessing the amount of compensatory damages for personal injuries (Nichols *v.* Brabazon, 94 Wis., 549).

In Campbell *v.* Pullman Palace Car Company (42 Fed., 484) the plaintiff, a woman, complained of an indecent assault that had been made upon her by a porter of the sleeping car in which she was traveling. It will be observed that the suit was not against the porter, but against the Pullman Company, so that no question of malice or of punitive damages could arise. (See Woodward & Lothrop *v.* Ragland, 5 App. Cas. D. C., 22). District Judge Shiras in his charge to the jury in that case instructed them to allow the plaintiff compensation for the pain and suffering which had been caused the plaintiff, or might thereafter be caused her.

In the *Oriflamme*, 3 Sawyer, 404, in which case Deady, district judge, sitting in admiralty, himself assessed the damages, he allowed the plaintiff, a servant girl, $500 damages on account of a scar on her forehead, this allowance being in addition to other allowances for pain and suffering caused by the injury.

In Rosenkranz *v.* Ry. Co., 108 Mo. 9, the supreme court

of Missouri held that, where the plaintiff's face and jaws were crushed and disfigured for life, it was proper to tell the jury to allow him compensation (1) for pain of body and mind; (2) for loss of earnings; (3) for any physical disfigurement or deformity, and (4) for any permanent injury other than disfigurement and deformity.

In American Strawboard Co. *v.* Foust, 12 Ind. App., 42, in which case the plaintiff's arm was permanently crippled, it was held that the jury was properly instructed in fixing the damages to take into consideration the plaintiff's bodily and mental suffering, and the fact that he "is deprived of the pleasure and satisfaction in life that those only can enjoy who are possessed of a sound body and the free use of all its members."

In Kendall *v.* City of Albin, 73 Iowa, 241-243, in which case the jury had been instructed to allow compensation for bodily pain and mental anguish in the future, the supreme court of Iowa held the instruction correct, saying:

"If any damages in the future may be recovered, we see no reason why mental anguish caused by the future condition of the injury should not be considered."

In the following additional cases damages for mental suffering growing out of deformity and disfigurement were held properly allowed in personal-injury cases:

Railway Company *v.* Dobbins, 60 Ark., 485.
Newbury *v.* Mfg. Co., 100 Iowa, 457.
Ry. Co. *v.* Young, 81 Ga., 412.
Stewart *v.* Maddox, 63 Ind., 68.
Cameron *v.* Bryan, 89 Iowa, 222.
Schmitz *v.* Ry. Co., 119 Mo., 269.
Ry. Co. *v.* Whetfield, 44 Miss., 496.
Matteson *v.* Ry. Co., 62 Barb., 379.
Ry. Co. *v.* Wood, 48 Ga., 569.
Alexander *v.* Humber, 8 Ky. Law Rep., 619.
Ballou *v.* Farnum, 11 Allen, 77.
Gray *v.* Washington Power Co., 30 Wash., 665-673-674.
And see 8 Am. & Eng. Enc. (2d ed.), 664.

We come now to consider authorities cited on this point by counsel for the plaintiff in error on pages 68 to 72 of their brief, and we take them in their order.

1. Bovee *v.* Danville, 53 Vt., 153:

In that case a woman who had been injured had a miscarriage, resulting in the death of twin children. It was held that, while she could recover for mental suffering at the time of the miscarriage, her injured feelings following it and not part of the pain actually attending it, in the nature of *grief over the loss of her children*, was too remote to be taken into consideration. It may be mentioned, however, in this connection, that under a precisely similar state of facts Judge Lumpkin, speaking for the supreme court of Georgia, reached an exactly opposite conclusion. (See Smith *v.* Overby, 30 Ga., 241.)

2. Chicago and Grand Trunk Ry. Co. *v.* Spurrey, 69 Ill. App., 549:

This case is in point, but it is not a case in a court of last resort. The court disposes of the matter in a single sentence, giving no reason for its conclusion, and refers only to other Illinois cases, only two of which are in the supreme court of the State—Peoria Bridge Association *v.* Loomis, 28 Ill., 225, in which case no such point was made or discussed by the court, and Ry. Co. *v.* Cole, 165 Ill., 334. In Ry. Co. *v.* Cole, 165 Ill., 388, in which it was claimed that the plaintiff's counsel had improperly urged the jury to allow the palintiff damages growing out of his fear that his varicose veins might burst. It was held that the argument was an improper one, but that, as no exception was taken to it, the supreme court could not reverse the judgment. In that case the court held that the trial judge properly instructed the jury to consider "whether or not he [the plaintiff] has been permanently injured, and *also to what extent, if any, he has*

been injured or marred in his personal appearance, and to what extent, if any, he may have endured physical and *mental* suffering as a natural and inevitable result of such injury. * * * And you may consider what, if any, effect such injuries may have upon him *in the future* in respect to pain and suffering."

The distinction which the court seems to make is that, while in such case a plaintiff may recover for mental suffering growing out of his actual physical condition, he may not recover for anxiety about what simply may happen and which is not shown to be even probable. Even to this extent the decision is contrary to the cases cited on page 28 of our principal brief.

As further illustrating the law in Illinois on this subject, we refer to Ry. Co. *v.* Kleinsmythe, 34 Ill., 44. In that case the court refused to set aside a verdict on the ground of excessive damages where the plaintiff's limb was so injured that he could not use it, and the court said it could not hold that the damages were excessive because the jury found that the damages allowed were no more than compensated the appellee for, among other things, the pain endured and *the necessity on his part of passing the rest of his life as a cripple.*

In Ry. Co. *v.* Gemmill, 209 Ill., 641, a personal-injury case, the following instruction was held to be correct:

"The jury are instructed that if you find for the plaintiff in this case you will be required to determine the amount of his damages, and in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances in evidence before them, and the nature and extent of plaintiff's physical injuries, if any, testified about in this case, so far as shown by the evidence, his suffering in body and in mind, if any, resulting from such injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, he will sustain by reason of such injuries."

3. Giffen *v.* City of Lewiston, 6 Idaho, 231:

In this case, as will be seen from the quotation from the opinion given on page 71 of the brief for the plaintiff in error in the case, it was held that the court did not err in instructing the jury to take into consideration as an element of damage the plaintiff's disfigurement. But it further held that annoyance to the plaintiff because of contemplation of his disfigurement was too remote. This is a distinction which is made in no other case, and which is too fine for our understanding. The court indulges in no reasoning on the subject, and does not cite any case.

4. Morse *v.* Duncan, Receiver, 14 Fed., 396:

That case has no application whatever. Plaintiff flagged a train which did not stop. He received no personal injury, and the court simply say that he could not recover for mental suffering, because pain of mind is the subject of damages only when it is connected with personal injury.

5. Chicago, R. I. & Pac. Ry. Co. *v.* Caulfield, 63 Fed., 396:

This case is in point. The court disposes of the matter in a single sentence, giving no reason for its opinion and citing only one case—Bovee *v.* Danville, 53 Vt., 190, the miscarriage case above referred to, which clearly has no relevancy to this question.

On the whole, it is submitted that the overwhelming weight of authority is that mental suffering growing out of a severe and permanent physical injury is not to be excluded in estimating the damages, because it is not accompanied by actual physical pain.

On principle it seems impossible to distinguish mental suffering resulting from deformity and disfigurement from mental suffering growing out of any other physical injury. The cases which hold that mental suffering, dissociated from

physical injury, is not the subject of compensation may or may not establish a correct principle, but they clearly have no relevancy in this discussion.

The absurdities to which the doctrine contended for here by counsel for the plaintiff in error would lead are a strong argument against the validity of that contention. According to their theory, if by reason of a defendant's negligence a female plaintiff had lost part of the flesh of her arm, the damages would be the same as if she had lost her nose, provided the physical pain was the same in the two cases, although in one case the injury done to the plaintiff would be slight, while in the other case it would be enormous.

So according to the theory of opposing counsel, if the defendant has published of the plaintiff that he is a eunuch, for the mental suffering resulting from his being *called* a eunuch, he may recover damages; while, if the defendant by his negligence shall have actually made a eunuch of him, he cannot recover for his mental suffering after his wound has healed.

Fortunately this last proposition is settled for us by the case of Denver, &c., Ry. Co. *v.* Harris, 122 U. S., 597-608. It was there held that where the plaintiff's injury resulted in the loss of the power to have offspring—a loss resulting from the nature of the plaintiff's wound—that that might be considered in estimating compensatory damages.

In fact, this whole discussion might have been avoided by simply referring to the case of Washington and Georgetown R. R. Co. *v.* Harmon, 147 U. S., 571.

In that case the plaintiff had been injured in a street-car accident through the negligence of the defendant. The instruction which the trial court gave to the jury as to the measure of damages is as follows:

"If the jury find for the plaintiff they will find for him such an amount of damages as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time, and the expenses of cure that naturally and proximately

resulted from the injury he suffered; and if they find that the injuries sustained by the plaintiff are permanent they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience, and the loss of time that he will suffer in the future. In determining this as to the future they will consider plaintiff's bodily vigor and age as shown by the evidence adduced."

Referring to this instruction, as to which an exception had been taken, Mr. Chief Justice Fuller, speaking for the entire court, said (p. 584):

"Another error assigned is that the instruction in relation to damages was objectionable in permitting an award for the future effects of the injury; but there was evidence which justified a finding that future damages would inevitably and necessarily result, and this being so there was no error in the instruction upon that subject."

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